FILE COPY

IN THE

Supreme Court of the United States

October Term 1958

No. 786

ROGER L. ANDERSON, ET AL.,

Appellants,

vs.

CITY OF CEDAR RAPIDS,

Appellee.

BRIEF IN OPPOSITION TO MOTION TO DISMISS

APPEAL FROM THE SUPREME COURT OF THE STATE OF IOWA

ERNEST F. PENCE
915 Merchants National Bank Bldg.
Cedar Rapids, Iowa

ROY A. GOLDEN
1108 Register & Tribune Bldg.
Des Moines, Iowa

Attorneys for Roger L. Anderson, et al., Appellants

1958—Northwest Brief Printing Co., Minneapolis 15, Minn. FE 8-5979

INDEX

	Page
Question Presented on Motion	2
Statement	2
Argument	4
Conclusion	9

AUTHORITIES CITED

Cases:

	Page
Forsyth v. City of Hammond, 166 U.S. 506	6
Hunter v. City of Pittsburg, 207 U.S. 161	4
Lambert v. People of California, 355 U.S. 225	8
Marsh v. City of Eldorado, 217 Ark. 838, 233 S.W.2d 536	4, 5
Mullane v. Central Hanover B & T Co., 339 U.S. 306	7, 9
Myles Salt Co. v. Board of Commissioners, 239 U.S. 478	8
New York v. New York, N. H. & H. R. Co., 344 U.S. 293	5, 7
State v. Texas City, 303 S.W.2d 780	4, 5
Walker v. City of Hutchinson, 352 U.S. 112	5, 7
Wisconsin Elec. Power Co. v. City of Milwaukee, 352 U.S. 948	6

Statutes:

Code of Iowa 1954, Sec. 362.26	3, 4, 5, 6, 8
Code of Iowa 1954, Sec. 362.27	1, 2
Rule 69.01, Iowa Rules of Civil Procedure	3
United States Constitution, 14th Amendment	4

IN THE

Supreme Court of the United States

October Term 1958

No. 786

ROGER L. ANDERSON, ET AL,

Appellants,

vs.

CITY OF CEDAR RAPIDS,

Appellee.

BRIEF IN OPPOSITION TO MOTION TO DISMISS

APPEAL FROM THE SUPREME COURT OF THE STATE OF IOWA

In compliance with Rule 16 of the Revised Rules of the Supreme Court of the United States, appellant submits herewith its brief in opposition to the Motion to Dismiss filed by the appellee City of Cedar Rapids in this appeal.

QUESTION PRESENTED ON MOTION

The Supreme Court of the United States should take jurisdiction to consider a substantial federal question determined by the Supreme Court of Iowa which held that Sec. 362.27, *Code of Iowa 1954*, providing for notice by publication only to landowners of judicial proceedings instituted by a municipal corporation to secure annexation of their property was sufficient to meet the requirements of due process where the interests, names and addresses of the property owner defendants were known by, in possession of, and readily available to said city.

STATEMENT

A complete statement of the pertinent facts is set forth in Appellant's Statement as to Jurisdiction; however, a further brief statement is required to correct the Appellee's Statement of Facts in its Motion to Dismiss.

These judicial proceedings were instituted against 537 landowners by service of notice by publication only pursuant to Sec. 362.27, *Iowa Code 1954*. No other form of notice, mail or otherwise, was given. The 90 landowners now appealing are among the 537 so served. At a different time, action was instituted against another group of approximately 1,500 landowners and none of these 1,500 landowners is in any manner involved in this appeal and neither were they involved in any of the proceedings in the lower court leading to this appeal. In the Special Appearance made by these appellants in the trial court to challenge the constitutionality of said Sec. 362.27 it was alleged that the notice given was only by publication pursuant to this statute and at the hearing thereon in the trial court the appellee did not show notice was given in any other form.

Sec. 362.26 requires that the judicial proceedings be commenced against all property owners and adequate notice to the group of 1,500 owners would not give the Court jurisdiction over the other group of 537 owners who were not given adequate notice except by the use of the class action theory. The appellee urged this theory on the Iowa Supreme Court but it was rejected.

The record on which the trial court and the Supreme Court of Iowa based their rulings showed only published notice. After the appeal was taken and brief and argument filed, the appellee attempted to prove by affidavit that mailed notice was given. Affidavits showing no such mailed notice are now on file in the trial court. The Supreme Court of Iowa specifically found that there was no compliance with Rule 60.1, *Iowa Rules of Civil Procedure,* which requires mailed notice, and it is improper for the appellee to urge this in their motion to dismiss.

It should be noted further that the appellee does not controvert the fact that the property interests, names and addresses of the 537 owners affected by the Court proceedings were known by, in possession of, and readily available to the city because their names appear on the records and for reasons mentioned neither can it be disputed that notice was given by publication only.

ARGUMENT

A Substantial Federal Question Is Presented When a State Statute Providing for Notice by Publication Only to Property Owners of Judicial Proceedings Involving Their Property Rights Has Been Held by the Supreme Court of Iowa to Be Valid and Not Repugnant to the Constitution of the United States.

The only question presented by this appeal is whether notice by publication of a judicial proceeding against these appellants meets the due process of law requirements of the 14th Amendment to the United States Constitution. The appellee erroneously argues that the question presented to this Court concerns the general power of a Legislature to change municipal boundaries.

It must be kept in mind that *Iowa Law*, Sec. 362.26, provides for judicial determination of annexation and the Legislature thereby intended for property owners to have an opportunity to come forward and present their defenses.

Appellee first contends that a Legislature may provide for annexation without a notice or hearing and relies on *Hunter v. City of Pittsburg*, 207 U.S. 161, to support its position. Also cited in support of this contention are *Marsh v. City of Eldorado*, 217 Ark. 838, 233 S.W.2d 536, and *State v. Texas City*, 303 S.W.2d 780. None of the cases relied upon by appellee involved a question of notice of a judicial proceeding. The case of *Hunter v. City of Pittsburg*, 207 U.S. 161, involved the merger of two cities by a vote of the majority of the voters of both cities. A voter contended that the Pennsylvania statute which permitted the vote violated the 14th Amendment to the United States Constitution. No contention was made as to adequate or inadequate notice of a judicial proceeding.

The case of *State v. Texas City*, 303 S.W.2d 780, is relied upon by the appellee but it involved the annexation of land by ordinance of the annexing city, and no question of adequate notice to the defendants of a judicial proceeding against them was raised. Appellee cites, in the first section of its argument, only one case which involves a judicial proceeding. In that case of *Marsh v. City of Eldorado*, 233 S.W.2d 536, landowners challenged the constitutionality of an Arkansas annexation statute because it placed the burden of proof on the objecting landowners. Again, the case presented no question of adequate notice to the defendants of the judicial proceeding.

From an analysis of the cases cited in the first section of appellee's Argument in its Motion to Dismiss, it is clear that none of them are applicable to the issue raised by the appellants.

In Division 2 of Appellee's Brief appellee attempts to avail itself of the class action theory by saying that adequate notice to the 1,500 would be satisfactory. The 537 landowners, 90 of which are these appellants, are in no manner involved with the group of 1,500. The action was commenced against these two groups at different times. Although they are all defendants in this action, Sec. 362.26 of the *Iowa Code, 1954*, demands all owners be made defendant in the proceedings and, therefore, adequate notice to all is required. The Iowa Supreme Court rejected the class action theory and based their holding on the single proposition that published notice was sufficient.

The third section of appellee's Argument in its Motion to Dismiss again discusses the general power of a city to annex. The notice question and the general power question were distinguished by this Court in *New York v. New York, N. H. & H. R. Co.*, 344 U.S. 293; *Walker v. City of Hutchinson*,

352 U.S. 112, and *Wisconsin Elec. Power Co. v. City of Milwaukee*, 352 U.S. 948, and they are clearly distinguishable here.

In *Wisconsin Elec. Power Co. v. City of Milwaukee*, 352 U.S. 948, it was not questioned whether the city had the power to levy paving assessments but whether if a hearing was to be held to review the advisability of the assessment and provide the owners in question an opportunity to be heard, was notice by publication alone sufficient or was the statute providing for the published notice unconstitutional as violative of due process? This Court, in a per curiam opinion, without hearing arguments, held in that case the requirements of due process had not been met and the statute unconstitutional. In that case the review provided for was only quasi judicial and in this case it is judicial.

In the case of *Forsyth v. City of Hammond*, 166 U.S. 506, relied upon by the appellee, this Court discussed the general powers of a city to annex and concluded that the procedure used in that case was proper. It is interesting to note that this Court found that there was adequate notice and said, at page 517:

> "She (the defendant) was brought in by appropriate process, and compelled to then litigate the question." (Parentheses supplied.)

In this action the appellee is attempting to annex to itself an area in excess of 8,300 acres. The appellee, a municipal corporation, now covers approximately 18,000 acres. This is an increase of over 45% in the present area of the appellee. Under Section 362.26, *Code of Iowa, 1954*, the landowners in the area to be annexed are guaranteed the right to present evidence of certain defenses to the annexation proceedings. These defenses are set forth in Subsection 6 of the above statute and are as follows:

"6. If the court finds that there is an affirmative showing that the municipal corporation is capable of extending into such territory substantial municipal services and benefits not theretofore enjoyed by such territory, so that the proposed annexation will not result merely in increasing the revenue from taxation of such municipal corporation; and if the court finds further that all of the proceedings and conditions precedent to annexation as required hereinbefore by subsections 1 through 5, inclusive, have been duly instituted and carried out as provided herein, the court shall decree the annexation. No costs shall be taxed against any defendant who fails to make a defense."

The appellee contends that published notice of this action against these landowners is adequate to notify them to appear and present their defenses. The appellants contend that published notice is insufficient and in fact diametrically opposed to this Court's pronouncements in many cases. In *New York v. New York, N. H. & H. R. Co.*, 344 U.S. 293, the Court said:

> "Notice by publication is a poor and sometimes a hopeless substitute for actual service of notice. (Citing the Mullane case.) * * * The statutory command for notice embodies a basic principle of justice—that a reasonable opportunity to be heard must precede judicial denial of a party's claimed rights."

In the leading case on adequate notice, *Mullane v. Central Hanover B & T Co.*, 339 U.S. 306, this Court said, at page 314:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

In a more recent case, *Walker v. City of Hutchinson*, 352 U.S. 112, this Court said, at page 117, that:

> "There is nothing peculiar about litigation between the Government and its citizens that should deprive those citizens of a right to be heard."

This appeal clearly comes within the rule of the above cases. If the ruling of the Iowa Supreme Court is allowed to stand, rights of property owners will be adjudicated without notice to them; and certain property owners will not even be allowed to defend in this action. The appellants are merely asking for fairness in a judicial proceeding and the only way to insure this is for adequate notice to be required.

Annexation does involve specific property rights, the taking of which would violate due process requirements. *Myles Salt Co. v. Board of Commissioners*, 239 U.S. 478. This case was decided in 1916, many years before the innovation of zoning laws and other restrictions which are embodied in modern-day municipal laws. The territory involved in the case at bar is largely agricultural as may be seen from the plat attached to the city's original petition. The Iowa Legislature considered that landowners' rights were being disturbed in the annexation of their property, otherwise they would not have provided them with an opportunity to defend as they did in Section 362.26 where they provided for judicial determination of the question.

The appellee states that the record does not show that these property owners would be subjected to any greater restrictions or be subjected to greater taxation if their property were annexed. It is foolish to argue that they would not be subjected to much greater taxation. There are a myriad of restrictions contained in the Municipal Code of Cedar Rapids, 1952, which contains over 1,700 sections.

The latest pronouncement of this Court with regard to the question involved in this appeal was in *Lambert v. People of California*, 355 U.S. 225, at page 228, where Mr. Justice Douglas said:

"Engrained in our concept of due process is the requirement of notice. Notice is sometimes essential so that the citizen has the chance to defend charges. Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed. Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act. Recent cases illustrating the point are Mullane v. Central Hanover Bank & Trust Company, 339 U.S. 306, 70 S.Ct. 652, 94 L. ed. 865; Covey v. Town of Somers, 351 U.S. 141, 76 S.Ct. 724, 100 L. Ed. 1021; Walker v. City of Hutchinson, 352 U.S. 112, 77 S.Ct. 200, 1 L. Ed. 2d 178."

CONCLUSION

The federal question in this appeal is substantial and of great importance. State Courts continue to ignore the precedent established in the *Mullane* case and followed in later cases relied upon by the appellants and, unless probable jurisdiction is noted, published notice in judicial proceedings will be sufficient in Iowa although the name and address of the defendant are known to the plaintiff.

Respectfully submitted,

ERNEST F. PENCE
915 Merchants National Bank Bldg.
Cedar Rapids, Iowa

ROY A. GOLDEN
1108 Register & Tribune Bldg.
Des Moines, Iowa

Attorneys for Roger L. Anderson, et al, Appellants